

TESTIMONY OF LEE D. HOFFMAN TO COMMERCE COMMITTEE
CONCERNING RAISED BILL 5436

HELLO, MY NAME IS LEE HOFFMAN, AND I AM AN ATTORNEY WITH THE LAW FIRM OF PULLMAN & COMLEY IN HARTFORD CONNECTICUT. I HAVE BEEN PRACTICING IN THE BROWNFIELDS AREA FOR MOST OF MY PROFESSIONAL LIFE. I WAS IN ATTENDANCE AT EPA'S FIRST BROWNFIELDS CONFERENCE IN WHICH SEVERAL HUNDRED PEOPLE FILLED A HOTEL BALLROOM IN PITTSBURGH, AND I SPOKE AT EPA'S LAST BROWNFIELDS CONFERENCE IN WHICH OVER 6,000 PEOPLE FILLED THE NEW ORLEANS CONVENTION CENTER.

I WAS ALSO FORTUNATE ENOUGH TO SERVE AS A MEMBER OF THE GENERAL ASSEMBLY'S TASK FORCE ON BROWNFIELDS STRATEGIES, AND I AM GRATEFUL FOR THIS COMMITTEE'S SUPPORT OF THAT TASK FORCE. THIS COMMITTEE WAS RESPONSIBLE FOR REAL IMPROVEMENT IN HOW BROWNFIELDS ARE HANDLED IN THIS STATE, AND I WANT TO RECOGNIZE THE LEADERSHIP THAT THIS COMMITTEE HAS SHOWN WITH RESPECT TO BROWNFIELD DEVELOPMENT.

THAT HAVING BEEN SAID, PROVISIONS OF RAISED BILL 5436 TROUBLE ME GREATLY. THE PROVISIONS OF SECTION 2 AND SECTION 3 OF BILL 5436 APPEAR TO BE MINISTERIAL CHANGES, AND I WILL NOT BE COMMENTING ON THOSE SECTIONS. HOWEVER, THE PROVISIONS OF SECTION 1 OF THIS BILL GIVE ME GREAT CONCERNS, AND I FELT I MUST SHARE THOSE CONCERNS WITH YOU.

AS CURRENTLY DRAFTED, THE PROVISIONS OF SECTION 1 WILL HAVE THE PERVERSE IMPACT OF ACTUALLY DISCOURAGING BROWNFIELD REDEVELOPMENT IN CONNECTICUT. THE FACT OF THE MATTER IS THAT SECTION 1 SO GREATLY BROADENS THE SCOPE OF WHAT CONSTITUTES A "POTENTIALLY RESPONSIBLE PARTY" THAT NO DEVELOPER WILL EVER WANT TO BE IN THE CHAIN OF TITLE OF A CONTAMINATED SITE EVER AGAIN. CONNECTICUT'S REMEDIAL STATUTES AS CURRENTLY DRAFTED ARE ACTUALLY PROGRESSIVE IN THAT THEY REQUIRE SOME LEVEL OF FAULT ON THE PART OF A POLLUTER BEFORE THAT INDIVIDUAL IS REQUIRED TO MAKE A PAYMENT UNDER THE

STATE'S REMEDIAL PROVISIONS. THE CURRENT VERSION OF SECTION 1 NOW ALLOWS FOR STRICT LIABILITY FOR ANY PERSON WHO DIRECTLY OR INDIRECTLY MAY HAVE HAD SOMETHING TO DO WITH THE POLLUTION AT A PARTICULAR SITE. NO RESPONSIBLE DEVELOPER WILL EVER WANT TO SIGN ON TO THAT TYPE OF UNLIMITED LIABILITY.

THE FACT OF THE MATTER IS THAT NO DEVELOPER EVER ENTERS A SITE CONTEMPLATING A LAW SUIT IN ORDER TO DO DEVELOPMENT. THE DEVELOPER LOOKS AT THE COSTS ASSOCIATED WITH REMEDIATION, ASCERTAINS WHETHER THOSE COSTS ARE LIMITED ENOUGH SO THAT THE DEAL MAKES SENSE, AND THEN DECIDES TO GO FORWARD WITH THE DEVELOPMENT IF THERE IS A LIKELIHOOD OF SUCCESS.

ALTHOUGH IT WOULD CERTAINLY BE BETTER FOR MY BOTTOM LINE AS AN ATTORNEY IF DEVELOPERS WERE LOOKING TO SUE OTHER POTENTIALLY RESPONSIBLE PARTIES, THEY ARE SIMPLY LOOKING TO BE IN THE REAL ESTATE DEVELOPMENT BUSINESS, NOT THE LAW SUIT BUSINESS. IN THE THREE YEARS THAT THE

TASK FORCE MET, NOT ONE PERSON WHO TESTIFIED BEFORE THE TASK FORCE ASKED FOR THIS TYPE OF RELIEF. NOT ONE BUSINESS OWNER, NOT ONE REAL ESTATE DEVELOPER AND NOT ONE MEMBER OF THE ENVIRONMENTAL COMMUNITY. THIS BILL WILL HAVE THE PERVERSE RESULT OF INCENTIVIZING DEVELOPERS TO DEVELOP GREENFIELDS AND OPEN SPACE RATHER THAN BROWNFIELDS FOR THEIR DEVELOPMENTS.

MOREOVER, THE PROVISIONS OF SECTION 1 STRIP PARTIES OF MEANINGFUL DEFENSES THEY MIGHT OTHERWISE POSSESS. AS WRITTEN, SECTION 1 WILL FORCE PARTIES TO A NEGOTIATING TABLE, REGARDLESS OF FAULT OR THE AVAILABLE DEFENSES THEY MAY HAVE. NEITHER THE DEPARTMENT OF ENVIRONMENTAL PROTECTION NOR THE FEDERAL ENVIRONMENTAL PROTECTION AGENCY HAVE SUCH POWERS, YET THIS STATUTE WOULD GRANT SUCH POWERS TO PRIVATE PARTIES WHO ARE SIMPLY CLEANING UP A SITE – REGARDLESS OF WHETHER SUCH CLEANUP IS REQUIRED BY RELEVANT REGULATIONS.

THERE ARE MANY OTHER PROBLEMS WITH THE VERSION OF SECTION 1 AS DRAFTED, HOWEVER, TIME DOES NOT PERMIT ME TO LIST THOSE IN THEIR ENTIRETY. HOWEVER, TIME DOES PERMIT A BRIEF HISTORY LESSON. LAST YEAR, THIS COMMITTEE WAS INSTRUMENTAL IN ENACTING P.A. 09-235, WHICH PROVIDED REAL BROWNFIELD REFORM IN THIS STATE. THIS COMMITTEE TOOK GREAT CARE TO MAKE SURE THAT ALL CONSTITUENCIES WITH A STAKE IN BROWNFIELD REDEVELOPMENT WERE REPRESENTED IN THE DEVELOPMENT OF P.A. 09-235, AND THE RESULT WAS A BILL THAT MOST PEOPLE, MYSELF INCLUDED, WAS AN IMPROVEMENT FOR THE REDEVELOPMENT OF CONNECTICUT'S BROWNFIELDS.

IN PASSING P.A. 09-235, THE LEGISLATURE WISELY ELIMINATED A SECTION FROM THAT BILL – THE SAME SECTION THAT IS NOW REAPPEARED IN SUBSTANTIALLY THE SAME FORM AS SECTION 1 OF RAISED BILL 5436. I URGE THIS COMMITTEE TO ONCE AGAIN ENCOURAGE BROWNFIELD REDEVELOPMENT AND ELIMINATE THIS SECTION FROM THE BILL.

I THANK YOU FOR YOUR CONSIDERATION OF THIS MATTER.

ADDENDUM – OTHER NEGATIVE IMPACTS OF SEC. 1 OF BILL 5436

- THE BILL IS NOT LIMITED TO BROWNFIELDS PROPERTIES, IT COULD APPLY TO ANY PROPERTY, REGARDLESS OF WHETHER THE SITE REQUIRES REMEDIATION.
- IN ADDITION TO EXPANDING LIABILITY FOR PRIVATE ENTITIES, THE BILL LIMITS LIABILITY FOR MUNICIPALITIES, EVEN IF THE MUNICIPALITY IS DIRECTLY RESPONSIBLE FOR THE CONTAMINATION (SUCH AS MUNICIPAL DUMP SITES OR SPILLS FROM MUNICIPAL GARAGES).
- AS A RESULT OF THE FOREGOING MUNICIPALITIES WILL THEN BE BROUGHT BACK INTO CONTAMINATED SITES BY ADDITIONAL STATUTORY CONTRIBUTION ACTIONS THAT THIS STATUTE DOES NOT ELIMINATE.
- MOREOVER, A DEVELOPER WHO IS WORKING WITH A MUNICIPALITY TO REDEVELOP A SITE WILL DOUBTLESS BE SUED FOR CONTRIBUTION BY ANY OTHER POTENTIALLY RESPONSIBLE PARTY.
- THE DEPARTMENT OF TRANSPORTATION AND OTHER STATE AGENCIES WILL ALSO LIKELY BE BROUGHT INTO SUCH SUITS WHERE POSSIBLE.
- THE MECHANISM FOR BRINGING PARTIES TO THE TABLE IS SIMPLY UNWORKABLE:
 - PROPOSED NOTICE, ALLOCATION AND PAYMENT SCHEMES ARE GOING TO BE TRIGGERED LONG BEFORE ANYONE HAS A REAL IDEA OF WHAT THE COST WILL BE TO REMEDIATE A SITE.
 - PROVISIONS IGNORE OTHER COST ALLOCATIONS SCHEMES SUCH AS THE REQUIREMENTS OF A CERTIFYING PARTY IN THE TRANSFER ACT (22A-134 *ET SEQ.*).
 - BILL DOESN'T ADEQUATELY ADDRESS THAT ADDITIONAL POTENTIALLY RESPONSIBLE PARTIES TAKE YEARS TO

LOCATE IN SOME INSTANCES, AND REMEDIES MAY TAKE EVEN LONGER TO ASSESS.

- HOW WILL ANYONE BE ABLE TO KNOW WHAT THEIR *PRO RATA* SHARE OF LIABILITY SHOULD BE AFTER ONLY A FEW MONTHS?
- THE COSTS THAT ARE RECOVERABLE INCLUDE COSTS THAT HAVE NOT YET BEEN INCURRED AND DO NOT NEED TO BE CONSISTENT WITH ANY PARTICULAR STANDARD.
- LIABILITY LIMITATION BASED ON PAST LAND USE IS UNWORKABLE AND THE PROVISIONS OF SECTION 1 WILL DELAY AND JEOPARDIZE ONGOING CLEANUPS.
- THE BILL APPLIES TO ANY CONTAMINATION, NOT JUST BROWNFIELDS OR NOT JUST CONTAMINATION THAT EXCEEDS APPLICABLE REGULATORY REQUIREMENTS.
- THE PROVISIONS OF THE BILL ARE INCONSISTENT WITH VOLUNTARY REMEDIATION PROGRAMS, COVENANTS NOT TO SUE AND OTHER THIRD PARTY LIABILITY PROVISIONS IN 22A-133.
- IN SHORT, THE BILL MAKES CONNECTICUT APPEAR TO BE A LITIGIOUS STATE WHERE ANY PARTY CAN TAKE POWERS TRADITIONALLY LEFT TO THE STATE AND BRING A SUIT AGAINST ANOTHER PARTY FOR WHICH THERE ARE NO DEFENSES.